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No. 85-1075

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

HOWARD DOUGLAS DANIEL,
Petitioner,

VS.

SECURITY PACIFIC NATIONAL BANK,
COMMERCIAL BANK OF SAN FRANCISCO,
LEASCO CAPITAL EQUIPMENT CORPORATION and
CAPITAL RESERVE LEASING CORPORATION,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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Continued on Inside Front Cover

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QUESTION PRESENTED FOR REVIEW

Is the interest of a bankruptcy debtor in a self-settled profit-sharing plan, which would not qualify as a spendthrift trust under applicable state law, either excluded from the bankruptcy estate by 11 U.S.C. § 541(c)(2) or exempted by 11 U.S.C. § 522(b)(2)?

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RESPONDENTS' BRIEF IN OPPOSITION

The respondents, Security Pacific National Bank, Commercial Bank of San Francisco, Leasco Capital Equipment Corporation and Capital Reserve Leasing Corporation,[1] respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion published at 771 F.2d 352 (1985).

After failing to persuade the Bankruptcy Court, the District Court or any member of the Court of Appeals panel, petitioner requests that this Court grant a writ of certiorari to uphold the policy of protecting federal pension benefits and to resolve an asserted conflict among the Courts of Appeals. Neither argument qualifies this case for review under Rule 17, Supreme Court

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[1] Pursuant to Supreme Court Rule 28.1, respondents list their parent companies, subsidaries and affiliates as follows:

SECURITY PACIFIC NATIONAL BANK

Parent:	Security Pacific Corporation
Subsidiaries:	First Small Business Investment Co. of California
	The Bank of Canton, Ltd.
	Pacific Southwest Realty Co.
	Security Pacific Australia, Ltd.
	Security Pacific Bank Canada
	Security Pacific Bank & Trust Co. (Bahamas), Ltd.
	Security Pacific Credit Corp.
	Security Pacific Financial Futures, Inc.
	Security Pacific Futures Commission Merchant, Inc.
	Security Pacific International Bank
	Security Pacific National Leasing, Inc.
	Security Pacific Overseas Corp.
	Security Pacific Overseas Investment Corporation
	Security Pacific Switzerland, S.A.
Affiliates:	Marac Holdings, Ltd.
	Tricontinental Holdings, Ltd.

LEASCO CAPITAL EQUIPMENT CORPORATION

Parent:	Reliance Group Holdings, Inc.

CAPITAL RESERVE LEASING CORPORATION

Parent:	Life Chemistry, Inc. (formerly known as Capital Energy Corporation)

COMMERCIAL BANK OF SAN FRANCISCO

None

Rules. The decision below in no way undermines the carefully drawn protections for reasonable pension benefits provided by the Bankruptcy Code and state law. Instead, the Ninth Circuit merely refused to countenance manipulation by a high-income debtor in an attempt to shield most of his assets from the claims of creditors. Nor did the decision below create a conflict requiring this Court's intervention; every Court of Appeals decision on point supports the result here. The petition should be denied.

STATEMENT OF CASE

Petitioner, Dr. Howard Daniel ("Dr. Daniel"), is a physician and sole owner of his professional corporation. Dr. Daniel established a corporate profit-sharing plan, appointed himself as the trustee, and made substantial contributions to the plan at the end of each fiscal year. Dr. Daniel borrowed $75,000 from the plan, on extremely favorable terms, to purchase a residence. Shortly before filing this bankruptcy proceeding, Dr. Daniel contributed all of his corporation's available cash to the plan, in order to shield it from the claims of his creditors.

Dr. Daniel then filed a petition under Chapter 7 of the Bankruptcy Code (11 U.S.C. §§ 701 *et seq.*), and claimed that his interest in the profit-sharing plan—listed at $98,000—was exempt from the claims of creditors. Had this exemption been upheld, he would have emerged from the bankruptcy case, after paying his creditors a nominal sum, with an annual income of $150,000 and a net worth of more than $100,000.

Respondents objected to Dr. Daniel's claim of exemption. The Bankruptcy Court sustained this objection, as did the District Court and the Ninth Circuit Court of Appeals.

All three courts held the profit-sharing plan interest to be non-exempt under both California law and federal non-bankruptcy law.[2] The California exemption statute permitted a debtor to

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[2] 11 U.S.C. § 522(b)(2) permits a debtor to elect either state exemptions plus those provided by federal non-bankruptcy law, or federal exemptions pursuant to 11 U.S.C. § 522(d). Dr. Daniel elected the former.

exempt his interest in a profit-sharing plan "designed and used for retirement purposes."[3] Dr. Daniel's use of his plan to fund purchase of a residence and his "loading up" of the plan on the eve of bankruptcy persuaded the courts that he had not used the plan principally for retirement purposes. The Ninth Circuit stated that "the plan essentially operated to meet debtor's short-term personal needs by lending money or shielding and hiding funds from creditors. . . . the debtor has failed to show how his transactions with the plan, by virtue of his role as trustee, were in furtherance of legitimate long-term retirement purposes."[4] Dr. Daniel does not seek review of this holding.

The Ninth Circuit also found the plan non-exempt under federal non-bankruptcy law, holding that the anti-alienation prohibitions in the Employee Retirement Income Security Act (ERISA)[5] and the Internal Revenue Code[6] do not exclude the debtor's interest in the plan from the bankruptcy estate under 11 U.S.C. § 541(c)(2), nor create a federal non-bankruptcy exemption under 11 U.S.C. § 522(b)(2)(A). Dr. Daniel seeks review of these holdings.

SUMMARY OF ARGUMENT

Dr. Daniel argues that the decision below undercuts the policy of protecting pensions from creditors and conflicts with decisions from the Fourth and Sixth Circuits. He asserts that definitive resolution of the issues in this case has great public importance.

These arguments have no merit. Both Federal and California law provide reasonable exemptions for pension benefits in order to protect debtors and their dependents. But those exemptions were not intended to permit high-income debtors to shield substantially all of their assets while discharging their debts. There is no

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[3] Former Cal. Code Civ. Pro. § 690.18 (recodified effective July 1, 1983 as Cal. Code Civ. Pro. § 704.115)

[4] Appendix A to Petition for Writ of Certiorari ("App."), p. A-13

[5] 29 U.S.C. § 1056(d)(1)

[6] 26 U.S.C. § 401(a)(13)

conflict among the five Courts of Appeals that have addressed the question and there is no basis or need for this Court's intervention.

ARGUMENT

1. The decision below is consistent with the policy of providing reasonable exemptions for pension benefits

Dr. Daniel argues that the decision below undercuts the policy of protecting pension plans from creditors. He ignores both the rationale for and the limits upon this policy. As the legislative history points out:

> The historical purpose of these exemption laws has been to protect a debtor from his creditors, to provide him with the basic necessities of life so that even if his creditors levy on all of his non-exempt property, the debtor will not be left destitute and a public charge.[7]

The decision below did not place Dr. Daniel, with his annual income of $150,000, in any danger of being "left destitute and a public charge." Rather, it prevented him from manipulating his profit-sharing plan to deny his creditors any significant recovery. Had Dr. Daniel been concerned with using the pension exemption statutes for their legitimate purpose of protecting his old age from poverty, both California and federal law gave him ample means to do so.[8] His exemption was denied, not because the three lower courts were insensitive to legitimate pension needs, but because Dr. Daniel used his plan for non-retirement purposes.

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[7] H.R. Rep. No. 95-595, 95th Cong. 1st Sess. 126 (1977).

[8] 11 U.S.C. § 522(d)(10)(E) provides an exemption for pension and profit-sharing plans to the extent reasonably necessary to support the debtor and his dependents. Cal. Code Civ. Pro. § 704.115 (and former § 690.18) generally provides a complete exemption for pension plans and limits the exemption only in the case of profit-sharing plans not designed and used for retirement purposes.

2. The decision below is consistent with every other Court of Appeals decision on point

As noted by Dr. Daniel, the decision below is consistent with *In re Goff,* 706 F.2d 574 (5th Cir. 1983), *In re Graham,* 726 F.2d 1268 (8th Cir. 1984), *In re Lichstrahl,* 750 F.2d 1488 (11th Cir. 1985), and *Regan v. Ross,* 691 F.2d 81 (2nd Cir. 1981).

Against these cases, Dr. Daniel cites *Tenneco, Inc. v. First National Bank,* 678 F.2d 688 (4th Cir. 1983), *General Motors v. Buha,* 623 F.2d 455 (6th Cir. 1980) and *McLean v. Central States, Southeast and Southwest Areas Pension Fund,* 762 F.2d 1204 (4th Cir. 1985). Examination of these cases reveals no conflict with the decision below.

Tenneco and *General Motors, supra,* hold that creditors may not attach ERISA pension payments from a third-party trustee. These cases deal with state-law attachment rights, not bankruptcy exemptions. They also do not discuss self-settled trusts, such as that involved in this case. Thus, the Ninth Circuit properly distinguished the cases. App., p. A-20, n.20.

McLean, supra, also presents no conflict. The *McLean* court cited *Goff, supra,* with approval, and explicitly followed its logic. 762 F.2d at 1208. Both cases concluded that 11 U.S.C. § 541(c)(2) excludes from a bankruptcy estate only traditional spendthrift trusts as defined by applicable state law. In *Goff,* the ERISA trust was self-settled, and thus would not qualify as an enforceable spendthrift trust under Texas law. Consequently, the trust interest was included in the bankruptcy estate. 706 F.2d at 588-89.

In *McLean,* the ERISA trust was *not* self-settled, and was thus an enforceable spendthrift trust under Illinois law. Consequently, it was included in the bankruptcy estate. 762 F.2d at 1207. There is no disharmony between *Goff* and *McLean;* they follow the same principle and reach a different result due to different facts.

In the case at bar, the profit-sharing plan was self-settled, as Dr. Daniel's manipulation plainly demonstrates. As such, it would not qualify under California law as a spendthrift trust. *Nelson v.*

California Trust Co., 33 Cal.2d 501, 502, 20 P.2d 1021 (1949). The decision below does not conflict with *McLean*.

3. There is no need for this Court to address the question

The question presented is whether a debtor's interest in a self-settled ERISA trust, which would not qualify under applicable state law as a spendthrift trust, is excluded from a bankruptcy estate pursuant to 11 U.S.C. § 541(c)(2) or exempted pursuant to 11 U.S.C. § 522(b)(2)(A). No Court of Appeals to consider either part of the question has held in the affirmative.

There is no conflict in the appellate decisions, nor any policy reason to reach a different result. Responsible pension benefits are adequately protected by both state and federal exemptions. Debtors do not, and should not, have the right to discharge their debts while retaining very substantial assets. *First Texas Savings Ass'n, Inc. v. Reed* (*In re Reed*), 700 F.2d 968, 991 (5th Cir. 1983).

CONCLUSION

The question presented is not deserving of review. The petition for Writ of Certiorari should be denied.

DATED: January 20, 1986

Respectfully submitted,

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STATEMENT OF MAILING

Pursuant to Supreme Court Rule 28.2, I, Richard A. Rogan, certify that I am a member of the Bar of the Supreme Court of the United States, and that on January 21, 1986, forty copies of the Respondent's Brief in Opposition were mailed, postage prepaid to Clerk, Supreme Court of the United States, Washington, D.C. 20543.

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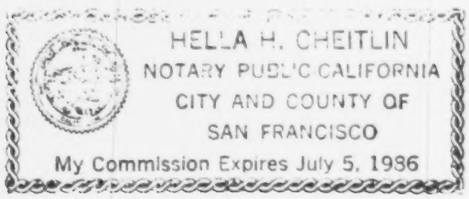
ACKNOWLEDGEMENT

On this 21st day of January, 1986, before me Hella H. Cheitlin, a Notary Public, State of California, personally appeared Richard A. Rogan, personally known to me or proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to this instrument and acknowleged that he executed it.



Hella H. Cheitlin
Notary Public, State of California

CERTIFICATE OF SERVICE

I, Richard A. Rogan, hereby certify that I am a member of the Bar of the Supreme Court of the United States and that on this 21st day of January 1986, three copies of the Respondent's Brief in Opposition to Petition for Writ of Certiorari were mailed to John H. MacConaghy, 2354 Powell Street, Watergate Center, Emeryville, California 94608, Counsel for the Petitioner.

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